86-83

Supreme Court, U.S.
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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LORENTZ W. HANSEN,

PETITIONER,

- v. -

PRENTICE-HALL, INC.,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JULY 14, 1986

SUPREME COURT OF THE UNITED STATES

LORENTZ W. HANSEN,

Petitioner,

PRENTICE-HALL, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Lorentz W. Hansen respectfully requests that a Writ of Certiorari issue to the U.S. Court of Appeals for the Second Circuit to review the judgment of that Court entered April 17, 1986 dismissing the complaint herein which alleges publication of a judicial opinion containing a defamatory passage after amendment of the opinion to delete the defamatory passage.

QUESTION PRESENTED

If the original version of a judicial opinion is published in full more than a

week after its amendment to delete libelous accusations against counsel, can the publisher rely on Section 74 of the New York Civil Rights Law for protection against a lawsuit for libel, in the face of the requirement imposed by both the plain meaning and judicial interpretation of Section 74 of the New York Civil Rights Law that only "full, fair and impartial" reports of judicial proceedings are privileged?

LIST OF PARTIES

The names of all parties appear in the caption of the case. Petitioner is an individual, not a corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 788 F.R.2d 892 and is reprinted in the appendix hereto at page 1.

JURISDICTION

Petitioner, a resident of New York State, sued respondent, a corporation organized and existing under the laws of Delaware and registered to do business in New York, for libel, in the New York State Supreme Court. Thereafter respondent removed the suit to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. 1441 et seq. On September 11, 1985 the United States District Court granted respondent's motion for summary judgment and this order was affirmed and judgment was entered on April 17, 1986 by the United States Court of

Appeals for the Second Circuit. This Court's jurisdiction to review the April 17, 1986 judgment of the Second Circuit pursuant to 28 U.S.C. Section 1254(1) is respectfully sought to be invoked.

STATUTE INVOLVED

This case involves Section 74 of the New York Civil Rights Law, which reads as follows:

> "§74. Privileges in action for libel
> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published. This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof."

STATEMENT OF THE CASE

As noted, Petitioner sued respondent for libel in the New York State Supreme Court and defendant removed the case to the United States District Court for the Southern District of New York, in which court defendant obtained summary judgment on the grounds that the judicial opinion it had published was protected by Section 74 of the New York Civil Rights Law. The facts of the case are as follows:

On November 1, 1983, the U.S. Court of Appeals for the Second Circuit issued a slip opinion in the case of Lyddan vs. U.S.A., Dkt. No. 83-6022, which contained the following language:

> "In his memorandum decision, Judge Murphy perceptively opined that Lyddan's testimony was tailored to the facts of relevant case law, particularly Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978)."

On November 9, 1983, the Appellate Court issued an amendatory slip opinion

deleting this statement. This amended opinion appears at 721 F.2d 873 (2d Cir. 1983).

On November 17, 1983, defendant published in verbatim form the original slip opinion, including the above-mentioned deletion, after collating, annotating and indexing by defendant's editors, and circulated it to approximately 17,000 subscribers in unbound advance sheet (looseleaf) format.

The conduct of William C. Lyddan, who was the plaintiff in Lyddan vs. U.S.A.; of his attorney, who is the plaintiff in the present case; and of the witnesses who testified for the plaintiff in Lyddan vs. U.S.A. at all times measured up to the highest moral, ethical and professional standards. Suggestions to the contrary in the judicial opinions in Lyddan vs. U.S.A., which suggestions had an instantaneous, ruinous impact on the professional

reputation of counsel in that case (petitioner in this case) could not be more totally in error. Petitioner herein was specially admitted to the bar of the United States District Court for the District of Connecticut to try the case of Lyddan vs. U.S.A. Every member of the Connecticut bar that petitioner had occasion to speak to during that period expressed outrage at the occasional abberrant behavior of the senior judge who presided at the trial of Lyddan vs. U.S.A. After judicial misconduct charges were brought, the trial court, having previously denied a motion to reconsider, suppressed its opinion in Lyddan vs. U.S.A., i.e., the trial court specifically requested West Publishing Company not to print it, which request West complied with. However, this fact did not become known until well after the Second Circuit Court of Appeals affirmed the trial court's opinion (721 F.2d 873) and until well after

this Court denied a request for review (cert. den. 104 S.Ct. 2656).

The previously-quoted section of the New York Civil Rights Law protects from libel suits a publisher of a "fair and true" report of a judicial proceeding. Thus the question posed by this case is whether under New York law a verbatim version of a judicial opinion continues to be a "fair and true" report after changes have been made in that judicial opinion, or whether mention must be made of these changes if the report is to be considered "fair and true".

REASONS FOR ALLOWANCE OF THE WRIT

THE ISSUE PRESENTED IN THIS CASE HAS BEEN DECIDED IN PLAINTIFF'S FAVOR BY THE NEW YORK COURT OF APPEALS; THIS PRECEDENT IS CONTROLLING UNDER 28 U.S.C. 1652, WHICH MANDATES APPLICATION OF THE LAW OF NEW YORK STATE IN THIS DIVERSITY OF CITIZENSHIP

CASE. As the Court said in Gertz v. Welch, 418 U.S. 323, 341, (1974), the right of an individual not to be defamed

> "reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the ninth and tenth amendments. But this does not mean that the right is entitled to any less recognition by this court as a basic of our constitutional system." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion).

It is interesting that all of the reasons advanced by the Court in Gertz for allowing the plaintiff - an attorney allegedly libelled by a news publication - to recover damages are present in this case. These include the relative inability (here impossibility) of the defamed individual to rebut the false charges; the fact that the individual defamed would himself be answerable for defamatory statements were the tables reversed; the absence of any strong policy reason for preventing

such plaintiffs from suing [no policy would seem to exist against requiring, in cases such as this in which the opinion seemingly went out of its way to insult and defame nearly everyone in sight, a single phone call to counsel or the court in question to find out whether the court had been asked to reconsider its opinion. West Publishing Co. made just such a call in Lowenschuss v. West Publishing Co., 542 F.2d 180 (3rd Cir. 1976)]; the fact that private individuals are very vulnerable to injury from defamatory utterances; and finally the fact that the plaintiffs in neither case had exposed themselves to the kind of defamatory attacks to which they had been subjected. See Gertz v. Welch, supra 336 et seq.

Section 74 of the New York Civil Rights Law protects publishers of reports of judicial proceedings in the event that matters set forth in accusations, complaints, findings, opinions, etc. are fac-

tually untrue. In return it exacts only a minimal price, namely, that the publisher ascertain that the version of the accusations, etc., that is published be "full, fair and impartial." Stevenson vs. News Synd. Co. 302 N.Y. 81 (1951) and Lewisohn v. Dial Press, 264 App.Div. 370 (1st Dept. 1942).

In Lewisohn v. Dial Press, Inc., 264 App.Div. 370 (1st Dept. 1942) a New York intermediate appellate court held that a report based on a judicial decision later reversed, without mention of the reversal, did not constitute a "fair and true" report of a judicial proceeding and was, therefore, not privileged but actionable. In fact New York law has always been clear that there are finite limits to the privilege. These are contained in the statute itself, Section 74 of the Civil Rights Law which does not require tolerance by the courts of any report of a judicial

proceeding but only of a "...fair and true report..." of such a proceeding. New York's highest court has squarely held to this effect. Stevenson vs. News Syndicate Co. 302 N.Y. 81 (1951). In that case the New York Court of Appeals stated:

> "The privilege established by Section 337 (predecessor of Section 74, Civil Rights Law) for reports of judicial proceedings embrances only 'full, fair and impartial' reports of such proceedings (Lee v. Brooklyn Union Pub. Co., 209 N.Y. 245, 248)." Stevenson, supra, p. 88. (Bracket added).

In the Stevenson case the then wife of the plaintiff in that case, in the course of a divorce proceeding, had made a motion for temporary alimony, charging her husband in the papers supporting the motion with infidelity. On August 13, 1948 the motion was withdrawn and on August 14, 1948 a withdrawal order was filed in the office of the Clerk of New York County. On August 18 and 19, 1948 the Daily News, defendant in the later libel action, published newspaper

accounts of the case relying solely on the papers that had been submitted in support of the motion for temporary alimony. These newspaper accounts described the misconduct alleged in the motion papers, but made no mention of the fact that the motion had subsequently been withdrawn. The New York Court of Appeals said:

> "The article said that Stevenson's wife made her charges against him 'yesterday' -- an assertion that was false. The article made no mention of the fact that the charges were made as part of a motion which had theretofore been withdrawn -- an omission that was unfair. In short, the article was neither true nor fair and consequently the privilege declared by section 337 of the Civil Practice Act did not attach to it. We pass on no other question. Stevenson, supra, p. 88." (Emphasis added).

The newspaper involved in Stevenson had even less time to acquire knowledge of the subsequent events in the proceeding which rendered the published account "unfair" - only 4-6 days. Defendant herein had over a week - November 9 to November 17, 1983. And defendant herein is more versed in

court procedure than Daily News reporters.

Analytically there are two separate and distinct factual aspects of any application of Section 74 of the New York Civil Rights Law to a report of a judicial proceeding.

The first consists of the factual events which gave rise to the controversy that was the subject of the judicial proceeding. It is clear from the language of this particular shield law that its purpose was to obviate the need on the part of a reporter to investigate these factual events in accordance with the normal requirements of responsible journalism. Almost by definition, of course, these factual events will have occurred many years before the judicial proceeding itself, thus greatly adding to the usual burdens of news gathering, and, in addition, reconstruction of past events is a task for which a judicial proceeding

itself, rather than the journalistic profession, is better suited. Hence the desireability from the standpoint of the public's right to know of permitting reporters to rely on the statements of fact, expressions of opinion, etc., that evolve out of a judicial proceeding. Nor does plaintiff question this policy al all when the absolute privilege of Section 74 attaches, as in Beary v. West Publishing Co. 763 F.2d 66 (2d Cir. 1985) cert. den. 1065 S.Ct. 232 (1985).

The second aspect consists of the factual events which take place in the course of the judicial proceeding itself, and it is equally clear from the language of the statute that the legislature did not intend to excuse reporters of judicial proceedings from investigating these factual events in accordance with all the normal requirements of responsible journalism. These factual events are more

or less contemporaneous with the report itself, and presumably reporters are capable of ascertaining the truth about these events and are capable of fairly and truly reporting them. In so doing they may not rush to press, abjuring all investigation or hoping that others will do their job for them and inform them of whatever they ought to know. As the New York Court of Appeals expressed it in ruling that there are finite limits to this statutory shield:

> "If it should be said that the haste with which they are obliged to publish, leaves them no time to inquire as to the facts, it is not exacting too much to require them to postpone the publication of the libelous portions of the account until a proper investigation into their truth can be made." Sanford v. Bennett, 24 N.Y. 20 (1861). Page 28.

Thus the news organization in Stevenson v. News Syndicate Co., 302 N.Y. 81 (1950) was not protected by the statutory shield, having failed to note that 4 days before its news story was published

the motion for temporary alimony, supported by affidavits on which its news story was based, had been withdrawn. Similarly the book publisher in Lewisohn v. Dial Press, Inc. 264 App. Div. 370 (1st Dept. 1942) was not protected by the statutory shield, having failed to note that the lower court decision on which the book was in part based had been reversed on appeal prior to publication of the book.

Thus it is clear that the statutory shield protects reporters of judicial proceedings only when others have made factual errors, not when they themselves have made factual errors, and this latter category of factual errors includes failures to note developments which took place in the judicial proceeding in question after information-gathering for the report but prior to publication of the report. Stevenson vs. News Syndicate, supra. No other meaning can be ascribed to the words

"fair and true" found in Section 74 of the New York Civil Rights Law, which words expressly qualify the statutory shield protecting publishers of false and defamatory matter emitted by a judicial proceeding. And the most authoritative source concerning the scope of this statutory shield, the New York Court of Appeals, has said:

> "The privilege...must be kept strictly within proper bounds...and not extended beyond the limits of the statute." Campbell v. New York Evening Post, 245 N.Y. 320 (1927).

Under diversity principles this case is governed by this repeatedly-expressed view of the New York Court of Appeals that the Section 74 absolute privilege should not be extended beyond the language of the statute. Sanford v. Bennett, supra; Campbell v. New York Evening Post, supra; and Stevenson v. News Syndicate, supra.

At any time after November 3, 1983 - two weeks before defendant published the

opinion in issue - defendant could have learned from plaintiff that plaintiff was shocked and nearly suicidal at the threatened destruction of an unblemished reputation based on 20 years of work and that plaintiff had urged the court by informal motions (telephoned and telegraphed) to withhold, pending a request for amendment, its November 1, 1983 opinion. And at any time after November 9, 1983 (still more than one week from the November 17, 1983 date of publication) defendant could have learned from the court itself that its opinion had been revised. Whether contacting the Court under such circumstances, and by necessary implication training its editors (who review opinions with a fine tooth comb for defendants own purposes) to be on the lookout for defamatory matter, would unreasonably burden the publishers of law reports is not here relevant. Defendant doubtless could accommodate itself to

the exigencies of such a rule - many other publishers accommodate themselves to infinitely greater burdens imposed on them by the libel laws. This is a matter for the New York State legislature - which in the past has extended the scope of this statutory shield to further protect publishers of law reports (see headnote amendment, Laws of 1930, chapter 619). The legislature can consider the problem and weigh the relative interests of the judiciary, the public and the victims of libel by judicial opinion, and, if it so desires in the interests of the People of the State of New York statutorily repeal the decision of the New York Court of Appeals in Stevenson v. News Syndicate, supra, holding that whether any published report of a judicial proceeding is "fair" is to be determined as of the time of publication, and not as of the time the publisher obtained its information. That the report may have been "fair"

at the earlier of the two dates is not sufficient to raise the statutory shield if the report was not "fair" at the latter of the two dates. And no good reason exists or is found in the statute for distinguishing between verbatim reports and summary accounts such as appear in newspapers and magazines. In fact the task of the publishers of verbatim reports is much simpler in this regard, since they need only ascertain if changes have been made, in the extremely rare instances in which judicial opinions contain libelous matter. They need not be concerned whether in other respects there has been compliance with the fair and true requirement. In fact so light is the burden of verbatim reporters of judicial opinions as compared to other reporters of these opinions that the view has obviously become widespread that the statutory shield has been made available to them without the extension of any

concomitant responsibilities whatsoever. But this view is contrary to the plain meaning of Section 74 of the New York Civil Rights Law, as interpreted by the New York courts. Defendant, of course, does not simply publish as hastely as possible the judicial opinions it obtains from its sources. Defendant reviews these opinions carefully to add citations to its own reports and to extract headnotes. This process evidently takes time since the decision herein was not published by defendant until 9 days after it was acquired by defendant. Plaintiff's motion to depose defendant's employees to determine whether any precautions, adequate or otherwise under the circumstances, were taken by defendant to guard against publication of frivilous, mistaken, libelous, etc. matter, was denied by the trial court. Such precautions might be burdensome - although in the present case a single telephone call to

plaintiff or the court clerk prior to November 17, 1983 would have disclosed that the panel that decided the Lyddan v. U.S. appeal had been asked to modify its opinion, and had in fact done so on November 9, 1983.

But the burdensomeness of such a requirement is not a legal issue for resolution by this Court - this issue has already been resolved by the legislature of the State of New York which has prescribed that only "fair and true reports" of judicial proceedings are privileged. New York Civil Rights Law Section 74. This draws a reasonable line between conflicting public policies - the right of publishers to circulate judicial opinions, and the right of individuals to be secure in their good names. The social interest of protecting reputations - particularly the reputations of members of a learned profession such as the law, which are patently vulnerable in

the extreme to harm by defamation - outweighs any burden on the publishers of law reports resulting from the "fair and true" requirement. But whatever the finite limits of this absolute privilege are to be, they should be prescribed by the New York State legislature, which is free to consider whether reports such as the one now in issue, considered by the victim of the libel contained therein to be egregiously unfair and untrue as compared to the final version of the judicial opinion in question, should nevertheless be eligible for the statutory shield.

CONCLUSION

In view of the important contribution of the Federal bar to the work of the Federal courts, petitioner respectfully requests this Court to grant certiorari and review the judgment of the Second Circuit Court of Appeals.

APPENDIX

OPINICN OF LCWER COURT

MESKILL, Circuit Judge:

Lorentz W. Hansen appeals from a judgment of the United States District Court for the Southern District of New York, Motley, C.J., granting Prentice-Hall's motion for summary judgment and dismissing Hansen's complaint. Prentice-Hall cross-appeals from the denial in that same judgment of its motion for sanctions against Hansen pursuant to Fed. R. Civ. P. 11.

Affirmed.

BACKGROUND

Attorney Hansen was trial and appellate counsel in Lyddan v. United States, 721 F.2d 873 (2d Cir. 1983), cert. denied, 467 U.S. 1214 (1984). Our decision in that case was issued on November 1, 1983. The slip opinion included a sentence

which Hansen claims defamed him as Lyddan's trial attorney.

On Hansen's urging, we deleted the sentence by an order dated November 9, 1983. Meanwhile, however, Prentice-Hall had received a copy of the original slip opinion on November 8. Prentice-Hall published the original opinion verbatim in the advance sheet edition of its American Federal Tax Reports on November 17, 1983.

Hansen alleged in his complaint that he had notified Prentice-Hall prior to publication of the advance sheet that he considered the sentence to be libelous and that the sentence did not appear in our "actual" opinion. In his affidavit to the district court in opposition to summary judgment and in his reply brief to this Court, he stated only that he believed he had notified Prentice-Hall that he was attempting to have the sentence removed. Prentice-Hall claims that it actually

learned of the amendment of the opinion upon receipt of a letter from a circuit judge's law clerk on November 28, 1983. The amended version of the Lyddan opinion was published in the bound version of American Federal Tax Reports.

Hansen, acting pro se, sued Prentice-Hall for libel in New York Supreme Court in August 1984. Prentice-Hall removed the suit to the district court on October 19, 1984, and moved for summary judgment and sanctions on August 2, 1985.

In a memorandum opinion dated September 11, 1985, Chief Judge Motley granted summary judgment but denied sanctions. She held that Prentice-Hall was immune from suit under New York Civil Rights Law section 74 as construed in Beary v. West Publishing Co., 763 F.2d 66 (2d Cir.), cert. denied, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985). Noting that an issue might have existed as to whether section 74

applied if Prentice-Hall had received notice of our amendment of Lyddan prior to publication, Chief Judge Motley found that Hansen's mere allegation of his belief regarding notification was insufficient to defeat the motion for summary judgment. Finding, however, that Hansen might have believed in good faith that he could prove notice and thereby distinguish this case from Beary, Chief Judge Motley denied Prentice-Hall's request for sanctions. Hansen appealed from the grant of summary judgment. Prentice-Hall cross-appealed from the denial of sanctions and also seeks sanctions on appeal.

DISCUSSION

New York Civil Rights Law section 74 immunizes the publisher of a "fair and true report" of a judicial proceeding from civil suit. N.Y. Civ. Rights Law § 74 (McKinney

1976). See Beary, 763 F.2d at 68. Hansen's primary claim on appeal is that the publication at issue here was not a fair and true report because the judicial opinion published by Prentice-Hall had been amended prior to its publication. The claim is meritless.

Hansen relies on two old New York decisions, Stevenson v. News Syndicate Co., 302 N.Y. 81 (1950), and Lewisohn v. Dial Press, Inc., 35 N.Y.S.2d 551 (App. Div. 1st Dept. 1942), for the proposition that the publication of a court's original opinion after that opinion has been amended is not protected by section 74. In both of those cases, however, the publication was not of the opinion itself but rather of defamatory facts for which a judicial opinion or filing was cited as authority. Here, Prentice-Hall published an indisputably accurate rendition of our original opinion in Lyddan v. United States. "Since

[Prentice-Hall's] publication of [our] opinion reproduced it precisely as written by the [Court], it clearly constituted a 'fair and true report' within the meaning of § 74," Beary, 763 F.2d at 68; cf. Lowenschuss v. West Publishing Co., 542 F.2d 180, 186 (3d Cir. 1976) (verbatim publication of opinion containing allegedly defamatory footnote held absolutely privileged), absent any showing that Prentice-Hall had received notice of the amendment prior to publication.

Assuming arguendo that proof of notice of the amendment prior to publication might have made a difference in the outcome here, the district court correctly found that there was no substantiated allegation of notice sufficient to defeat a motion for summary judgment. In his affidavit in response to summary judgment, as in his reply brief on appeal, Hansen stated only that he believed that he had notified

Prentice-Hall. Such a statement failed even to allege notice, let alone prove it. Cf. Eastway Construction Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985) (mere conclusory allegation insufficient to defeat summary judgment).

We turn now to the issue of sanctions. As discussed above, there were state court decisions that arguably could be read to indicate that the post-amendment publication of an original judicial opinion might not be privileged under section 74. Although there were discrepancies, as also noted above, between the factual allegations regarding notice in Hansen's complaint and those subsequently made in Hansen's affidavit and his reply brief on appeal, the district court's finding of his good faith on this point was not clearly erroneous. Because Hansen could "form a reasonable belief that [his complaint was] well grounded in fact and...warranted by

existing law," Rule 11 sanctions were not appropriate below. Eastway, 762 F.2d at 254. For similar reasons, sanctions are not appropriate on appeal. See In re Cosmopolitan Aviation Corp., 763 F.2d 507, 517 (2d Cir.), cert. denied, 54 U.S.L.W. 3407 (U.S. Dec. 16, 1985); cf. Mone v. Commissioner, 774 F.2d 570, 574 (2d Cir. 1985) (applying Eastway standard to frivolous appeal).

The judgment of the district court is affirmed.

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—v.—

PRENTICE-HALL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PRENTICE-HALL, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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10PP

QUESTION PRESENTED FOR REVIEW

May a person claiming to have been libeled by a court slip opinion, later amended by the court to delete the allegedly defamatory language, sue a publisher of the verbatim text of the original slip opinion notwithstanding that the publisher did not have notice of the amendment until after publication and a state statute provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding . . ."?

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BRIEF OF RESPONDENT PRENTICE-HALL, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Prentice-Hall, Inc., opposes the Petition for a Writ of Certiorari. The decision of the Second Circuit Court of Appeals does not conflict with a decision of any other circuit Court of Appeals or the New York Court of Appeals. The only issue raised by the petition is the construction of a state statutory privilege, which is not a matter requiring review by this Court.

STATEMENT OF THE CASE

Petitioner was trial and appellate counsel for the plaintiff/taxpayer in *Lyddan v. United States*, 721 F.2d 873 (2d Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984). On November 1, 1983, the Court of Appeals issued a slip opinion (the "Slip Opinion") affirming a judgment after trial against the taxpayer, which contained the following sentence:

> In his memorandum decision, [District] Judge Murphy perceptively opined that Lyddan's testimony was tailored to the facts of relevant case law, particularly *Sydnes v. Commissioner*, 577 F.2d 60 (8th Cir. 1978).

(A93.)*

Although the Slip Opinion did not refer to Petitioner as the taxpayer's trial attorney, Petitioner nevertheless contends that the above-quoted sentence implied that he "persuaded and suborned his client . . . to testify falsely and commit perjury" (A5-6) and imputed to him "unprofessional, unethical and dishonest conduct . . . and also . . . malpractice of law . . ." (A6).

On November 3, 1983, Petitioner sent a mailgram to Circuit Judge Pratt requesting the Court to withhold circulation of the Slip Opinion to allow Petitioner "to persuade the Court to eliminate the erroneous statement about Taylor [sic: "tailored"] testimony . . ." (A119). On November 9, Petitioner moved in the Court of Appeals to modify the Slip Opinion "to omit accusations of impropriety" allegedly made against him (A120).

Meanwhile, on November 8, Respondent, which publishes the *American Federal Tax Reports* (2d Series) ("AFTR"), received from the Court of Appeals its subscription copy of the

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* "A" citations refer to the "Appendix for Plaintiff-Appellant" in the Court of Appeals; "SA" citations are to the "Supplemental Appendix of Appellee-Cross-Appellant Prentice-Hall, Inc." in that Court.

Slip Opinion (A98-99). Respondent published the Slip Opinion in the November 17, 1983 AFTR advance sheet (A100-102; SA4; SA13-15).

In fact, on November 9, 1983, in apparent response to Petitioner's November 3 mailgram and before receiving Petitioner's motion to modify, the Court of Appeals amended the Slip Opinion to delete the sentence that Petitioner considered objectionable. However, Respondent first learned of the amendment only on November 28, 1983, when it received from Circuit Judge Pratt's clerk a copy of the undated order amending the Slip Opinion (A99; A103-105).[1] Although Respondent thereafter published the amended version of the Circuit Court opinion in the permanent volume of the AFTR (A106), Petitioner nonetheless brought suit for libel in New York State Supreme Court. Respondent removed the case to the United States District Court for the Southern District of New York which, on September 11, 1985 (A17), granted Respondent's motion for summary judgment.

REASONS FOR DENYING THE WRIT

In affirming summary judgment for Respondent, the Second Circuit Court of Appeals held that Respondent's publication of the Slip Opinion was absolutely privileged under Section 74 of the New York Civil Rights Law, notwithstanding that the Slip Opinion subsequently had been amended. The Circuit Court's opinion is consistent with the only other Court of Appeals decision addressing this issue. Furthermore, contrary to Petitioner's contention, the Second Circuit's decision does not conflict with any controlling decision of the New York Court of Appeals.

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1 Petitioner's verified complaint alleges that he had given Respondent notice of the amendment before publication of the AFTR advance sheet. However, when later confronted with facts showing that he could not have known about the amendment before November 17, 1983—the advance sheet publication date—Petitioner retreated to arguing that he "believed" that he gave notice. *Hansen v. Prentice-Hall, Inc.*, 788 F.2d 892, 893 (2d Cir. 1986). In the present Petition for a Writ of Certiorari, Petitioner has abandoned his contention of prior notice.

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS OR THE NEW YORK COURT OF APPEALS.

The Third Circuit Court of Appeals is the only other court to address in a similar context the scope of the immunity conferred on reports of judicial proceedings. In *Lowenschuss v. West Publishing Co.*, 542 F.2d 180 (3d Cir. 1976), the court affirmed dismissal under both New York and Pennsylvania law of the plaintiff/lawyer's libel suit against a legal publisher for reporting a court opinion that charged the plaintiff with misconduct, notwithstanding that the publisher had notice of the plaintiff's exoneration before publication. There thus is no conflict between the Third Circuit's decision in *Lowenschuss* and the Second Circuit's decision in this case.

Nor is there any conflict between the Second Circuit's decision and any controlling decision of the New York Court of Appeals. Indeed, there is no New York decision directly on point. The cases cited by Petitioner—*Stevenson v. News Syndicate Co.*, 302 N.Y. 81 (1950) and *Lewisohn v. Dial Press Inc.*, 264 App.Div. 370, 35 N.Y.S.2d 551 (1st Dep't 1942)—are inapposite, for neither involved verbatim publication of a court opinion. As the Second Circuit Court of Appeals observed in this case, in both *Stevenson* and *Lewisohn* "the publication was not of the opinion itself but rather of defamatory facts for which a judicial opinion or filing was cited as authority . . . [whereas] [h]ere Prentice-Hall published an indisputably accurate rendition of . . . [the] original opinion . . . ." 788 F.2d at 893.

The only decision of the New York Court of Appeals even arguably relevant is *Lee v. Brooklyn Union Publishing Co.*, 209 N.Y. 245 (1913), not cited by Petitioner. There, the court held under the predecessor to Section 74 of the New York Civil Rights Law that the reporter of a judicial proceeding did not lose its immunity from libel suits even though it was subsequently determined that the proceeding was improper. The

New York court ruled that the reporter was not responsible for determining whether the court's action constituted official judicial proceedings within the meaning of the immunity statute. The decision of the Second Circuit Court of Appeals in this case similarly holds that Respondent—having received a Slip Opinion directly from the court—had no duty to question whether the opinion was really an official court opinion. Thus, Petitioner does not raise an issue meriting review with his argument that Respondent had a duty to ascertain before publication whether the Slip Opinion had been modified by the Court of Appeals, for the Second Circuit's rejection of that argument is consistent with the only New York decision of any relevance.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

ALEXANDER GIGANTE
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Prentice-Hall, Inc.

Of Counsel:

MAILMAN & GIGANTE

August 11, 1986

86-83

Supreme Court, U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 8683

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LORENTZ W. HANSEN,

PETITIONER,

- v. -

PRENTICE-HALL, INC.,

RESPONDENT.

SUPPLEMENTAL APPENDIX

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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AUGUST 6, 1986

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LORENTZ W. HANSEN, :

Plaintiff, :

- against - :

PRENTICE-HALL, INC., :

Defendant. :

- X

84 Civ. 7540 (CBM)

APPEARANCES:

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Plaintiff, Pro Se

MAILMAN & GIGANTE
By: Alexander Gigante
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Attorneys for Defendant

MOTLEY, CH. J.,

MEMORANDUM OPINION

Plaintiff, an attorney, has brought this action claiming that defendant, Prentice-Hall, Inc., has defamed him by republishing a Second Circuit slip opinion, Lyddan v. United States, Dkt. No. 83-6022, which according to plaintiff, contained a libelous statement as to plaintiff. Defendant has moved for summary judgment and seeks sanctions against plaintiff pursuant to Federal Rules of Civil Procedure, Rule 11. Defendant's motion for summary judgment is granted. Its motion for sanctions is denied.

FACTS

On November 1, 1983, the Second Circuit issued an opinion, Lyddan v. United States, Dkt. No. 83-6022. Plaintiff, who was counsel for the plaintiff-appellant in Lyddan, requested that the appellate court revise its opinion in that case to delete a certain statement he believed to be

libelous as to himself as the attorney for Lyddan. The court deleted the statement on November 9, 1983.

Defendant, Prentice Hall, Inc., had received the original version of the opinion in issue on November 8, 1983. This version of the decision was published verbatim in advance sheet form by defendant on November 17, 1983 in its American Federal Tax Reports (2d Series) ["AFTR"]. On November 22, 1983, defendant was sent a copy of the Court of Appeals' amendatory order, five days after the circulation of the advance sheets. When the opinion was published in the permanent bound volume of AFTR, it was the amended version.

Plaintiff, in his amended complaint, asserts he had advised defendant of the opinion's amendment on or about November 9th, 1983. In his affidavit submitted in opposition to this summary judgment motion, however, plaintiff states only that he

believes he notified defendant of his request to the Court of Appeals to amend its opinion.

DISCUSSION

In Beary v. West Publishing Company, 763 F.2d 66, 69 (2d Cir. 1985), the Second Circuit held that section 74 of the New York Civil Rights Law grants absolute immunity to the publisher of a true report of a judicial opinion, regardless of whether the reporter is classified as "official" or "unofficial." Section 74 provides:

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

At the time defendant published the original opinion of the Court of Appeals, it had not been advised by that court of the amended opinion. What was published by

defendant was a "fair and true report" of the original opinion of the appellate court prior to amendment. Since defendant had not received the amended opinion until several days after it had released the original opinion, it should not lose its statutory privilege. Thus, defendant Prentice Hall has an absolute defense to this libel action. It, therefore, is entitled to summary judgment as a matter of law.

Plaintiff has failed to come forward with any proof that defendant was aware of the amended decision prior to its publication of the original opinion. In his sworn affidavit, plaintiff indicates only that he "believes" he advised defendant. Such proof is insufficient to defeat a motion for summary judgment.

Defendant also has moved for sanctions against plaintiff in accordance with Rule 11 of the Federal Rules of Civil Procedure,

arguing that plaintiff should have voluntarily withdrawn his suit after the Second Circuit decided Beary, supra. After carefully reviewing plaintiff's argument in defense of the summary judgment motion, however, this court believes plaintiff might have had good faith reasons to believe his case was distinguishable from Beary, supra. Prior to bringing of his summary judgment motion and the completion of discovery, plaintiff could not be certain that defendants had not received notification of the amended opinion before it had printed the original version. If defendant had received notification prior to the printing, an issue might have existed as to whether or not the privilege attached. Accordingly, defendant's motion for sanctions is denied.

CONCLUSION

Defendant's motion for sanctions pursuant to Federal Rules of Civil

Procedure, Rule 11 is denied. Defendant's motion for summary judgment is granted and this action is hereby dismissed with prejudice and discontinued.

Dated: New York, New York

September 11, 1985

SO ORDERED.

CONSTANCE BAKER MOTLEY

Chief Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1395 - August Term 1982

Argued: June 10, 1983

Decided: November 1, 1983

Docket No. 83-6022

WILLIAM C. LYDDAN,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

OAKES, PRATT, Circuit Judges,
and METZNER, District Judge.

Appeal from a judgment after a non-jury trial in the United States District Court for the District of Connecticut which denied appellant a tax deduction for alimony payments and denied him use of head

of household tax rates to compute his personal income tax for the year 1971.

Affirmed.

LORENTZ W. HANSEN, White Plains, New York, for Plaintiff-Appellant

JOAN I. OPPENHEIMER, Attorney, Tax Division, Department of Justice, Washington, D.C. (Michael L. Paup, Chief, Appellate Section, Tax Division, Department of Justice, Washington, D.C., Alan H. Nevas, United States Attorney for the District of Connecticut, of Counsel), for Defendant-Appellee.

PRATT, Circuit Judge:

Taxpayer William C. Lyddan appeals from a judgment of the United States District Court for the District of Connecticut, Thomas F. Murphy, Judge, which denied him a deduction under I.R.C. §215 (1976) for $7,200 in alimony payments made to his wife during calendar year 1971, and which prohibited him from using head of household income tax rates for the same year. For the reasons set forth below, we

affirm the judgment of the district court.

Soon after William Lyddan and Patricia Kopenhaver were married in February 1970 their marriage began to deteriorate. In July 1970, Kopenhaver, seeking equitable support for herself and her unborn child, sued Lyddan in Connecticut Superior Court for desertion. The court ordered Lyddan to pay his wife $600 per month as alimony pendente lite.

During 1971, despite the pending action, Lyddan and Kopenhaver lived in the same house. Although they maintained separate bedrooms and bathrooms, all entrances to the house were accessible to both, and both used the common areas on a regular basis. While they minimized their contact with each other, Lyddan and his wife occasionally shared the television room, attended social functions together, and on rare occasions had sexual intercourse.

Although Lyddan paid his wife pursuant to the court order, she refused to share in the household expenses. Lyddan not only paid for the household food; he also shopped for it. He furnished his wife with a car and maintained it for her as well. Lyddan even named her as the beneficiary of his life insurance policy.

Lyddan filed for divorce early in 1971 and obtained a judgment in his favor in July 1972. While he did not claim an alimony deduction for the payments to his wife on his initial 1971 return, when the IRS assessed him for underpayment of 1971 taxes he filed an amended return, claiming a deduction for the alimony payments in order to make up for the deficiency. When the IRS applied two subsequent overpayments to his original deficiency, Lyddan filed two separate refund claims totaling $9,635, based primarily on the claimed $7,200 alimony deduction. IRS denied his refund

claim and this action followed.

The issues raised by Lyddan, both at trial and now on appeal, are (1) whether he was separated from his wife during 1971 within the meaning of I.R.C. §71(a)(3) so as to entitle him to a deduction under I.R.C. §215 for the alimony payments he made to her; and (2) whether he should be treated as "not married" under I.R.C. §§2(c), 143(b) (1976 & Supp. I 1977), so as to entitle him to use favorable head of household rates under I.R.C. §§1(b), 2(b) to compute his personal income tax for 1971. United States Magistrate Arthur H. Latimer found that these issues involved questions of fact and denied the government's motion for summary judgment. Judge Murphy then conducted a two-day bench trial.

[In his memorandum decision, Judge Murphy perceptively opined that Lyddan's testimony was tailored to the facts of

relevant case law, particularly Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978).]* Lyddan had testified that the only reason he permitted Kopenhaver to reside in the same house was because the alimony order required him to do so, but the order contained no such requirement. Lyddan's son Jeffrey, who lived in his father's house during 1971, testified on his father's behalf, but the court found his testimony not worthy of belief and disregarded it. Kopenhaver also testified at trial, and the court accepted her testimony as to the instances of sexual intercourse, rejecting Lyddan's denial that they had cohabited at any time during 1971.

After reviewing the evidence in detail and making a number of subsidiary findings

*Deleted passage referring to opinion which trial court had, unknown to the parties, requested West Publishing Company not to publish.

and determinations of credibility, Judge Murphy held that "the facts conclusively prove that the Lyddans were not separated, nor were they living apart during the calendar year of 1971 but were living together in one home, married, but with hatred and contempt for each other." Accordingly, Judge Murphy held that Lyddan was not entitled to an alimony deduction under §215. He further found that Kopenhaver was a member of Lyddan's household during 1971, so that Lyddan could not be considered "not married" within the meaning of I.R.C. §§2(c) 143(b) and was therefore not entitled to use head of household tax rates for 1971.

On appeal, Lyddan argues that the district court's judgment should be reversed because its findings were clearly erroneous and because the court erred in not upholding appellant's claim which was based on the facts and holding in Sydnes v.

Commissioner, 577 F.2d 60 (8th Cir. 1978). The government contends that the district court should have ruled as a matter of law that appellant was not entitled to the deduction or to the favorable tax rates, and that in any event, the court's findings were not clearly erroneous.

It is familiar law that a district court's factual findings will not be set aside on appeal unless "clearly erroneous". Fed. R. Civ. P. 52(a); see Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Snyder v. Four Winds Sailboat Centre, Ltd., 701 F.2d 251, 253 (2d Cir. 1983), and this rule applies regardless of whether these findings are ultimate or subsidiary findings. Pullman-Standard, 456 U.S. at 287. Under these standards, the facts before us would very likely pass muster. We do not decide the point, however, because the issues on this appeal should be resolved as a matter of law, not as a

matter of fact. Judge Murphy also thought that the issue should have been resolved on summary judgment based upon the undisputed fact that the residences of Lyddan and Kopenhaver were not geographically separate. Having heard the evidence, however, Judge Murphy determined the subsidiary issues of fact and assumed that the magistrate's decision denying summary judgment, which had been adopted by Chief Judge Daly, was the law of the case. Without resolving whether Judge Murphy was obliged to defer to the prior decision denying summary judgment, we simply note that this court is not precluded from addressing the issue.

In our view, the unpleasant trial which took place before Judge Murphy was entirely unnecessary because the uncontested facts established in advance of trial that Lyddan and Kopenhaver were not separated and living apart, but instead

were living in the same residence. Consequently, Lyddan was precluded from deducting alimony payments under §215 as well as from using head of household tax rates.

Section 215 allows a husband to take a deduction only for amounts includable as income to his wife under §71. Section 71(a)(3) provides that a wife's gross income includes periodic payments received pursuant to a decree requiring a husband to make such payments for his wife's support and maintenance. But this provision on its face applies only if the wife "is separated from her husband". Sydnes, 577 F.2d at 62; see S. Rep. No. 1622, 83d Cong., 2d Sess. 171, reprinted in 1954 U.S. Code Cong. & Ad. News 4621, 4805. It follows then, that Lyddan's alimony payments were deductible under §215 only if Kopenhaver was "separated from" Lyddan.

Lyddan argues that just because a

husband and wife reside in the same dwelling does not preclude a finding that the wife is separated from her husband. He relies on Sydnes, an Eighth Circuit case which held that the issue of separation presents a factual question and that circumstances may exist where a husband and wife can live separately in the same residence. The court based its conclusion on the fact that "[n]either the statute nor the regulations specifically state that in order to live separately or apart the parties cannot occupy separate quarters in the same residence." 577 F.2d at 62. We respectfully disagree with Sydnes' conclusion that a fact issue can be presented when the couple occupies the same residence.

The relevant Treasury regulations specify that §71(a)(3) applies only where husband and wife "are separated and living apart." 26 C.F.R. §1.71-1(b)(3)(i) (1983)

(emphasis added). The Eighth Circuit's interpretation that "separated and living apart" could conceivably mean living apart in the same residence is in our view an unnecessarily strained and unduly expansive reading of this regulation. We think the phrase requires a geographical separation and means living in separate residences.

Such an interpretation provides an easily recognized, quickly applied standard for the tax deduction. A federal court should not have to inquire into the intimate, sometimes sordid details of a dissolving marital relationship in order to administer federal tax policy. Sydnes v. Commissioner, 68 T.C. 170, 176 (1977), rev'd in part, 577 F.2d 60 (1978); see Metzger Trust v. Commissioner, 693 F.2d 459, 467 (5th Cir. 1982), cert. denied, 103 S.Ct. 3537 (1983). Nor should the outcome of a contested deduction depend on a factual inquiry that probes so deeply into

the intimate living details of a now-estranged couple.

The complicated and unpleasant factual scenario of the case before us, which produced a trial described by Judge Murphy as a "nightmare", clearly demonstrates the need for a clean, "bright line" test. To avoid other drawn out replays of bitterly contested divorce trials and the resolution of future similar tax issues, we hold that before an alimony deduction can be allowed under I.R.C. §215, the husband and wife must have lived in separate residences during the relevant period. We further hold that a husband cannot qualify for head of household tax status when he and his wife occupy the same residence.

Affirmed.

Supreme Court, U.S.
F I L E D
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 86-83

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LORENTZ W. HANSEN,

PETITIONER,

- v. -

PRENTICE-HALL, INC.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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AUGUST 22 , 1986

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986
No. 86-83

LORENTZ W. HANSEN,

Petitioner,

- v. -

PRENTICE-HALL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

RESPONDENT'S REASONS FOR DENYING THE WRIT ARE UNSUPPORTED EITHER BY THE RECORD OR APPLICABLE LAW

Respondent's Brief in Opposition is in error in asserting that petitioner abandoned his contention of prior notice

or that petitioner was "confronted" by facts showing he could not have given respondent notice prior to the date of publication. The "notice" given to respondents (and other law publishers, including Commerce Clearing House) was to the effect that portions of the original opinion in question were libelous and that petitioner intended to make a motion for reconsideration. In fact, as the record shows (A-117), Commerce Clearing House, publishers of tax reports similar to respondents, did not print the original version. Since respondents' counsel carefully avoided submitting any affidavits whatsoever of persons having actual knowledge of the facts, as required by F.R.C.P. 56(e) in support of a motion for summary judgment, but submitted only his own affidavit, the full circumstances in this and other respects surrounding

publication of the original opinion by respondent were never made clear. In any event the existence of a "notice" prerequisite, suggested in the opinions below and by respondent, is unheard of in the law of defamation and would impose an impossible burden in the circumstances here present (and probably in every case) in view of the large number of potential publishers of reports, verbation and otherwise, of judicial proceedings. The victim of the defamatory statements might not even know of the existence of many potential publishers including publishers of law reports, law reviews, law journals, newspapers, magazines, etc.

The cases cited by respondent in opposition to this petition, Lee v. Brooklyn Union Publishing Co., 209 N.Y. 245 (1913) and Lowenschuss v. West Publishing Co., 542 F.2d 180 (3d Cir. 1976),

involved reports of judicial proceedings that were admittedly "full fair and impartial." These cases therefore differ materially from the present case. By contrast, the "old" cases relied on by petitioner - Stevenson v. News Syndicate Co., 302 N.Y. 81 (1950) and Lewisohn v. Dial Press, Inc., 264 App.Div. (1st Dep't 1942) involved reports that were admittedly not "full, fair and impartial." There is no reason either in the statute (New York Civil Rights Law Section 74) or in logic or policy for distinguishing a verbatim publication of a court opinion from a newspaper account of a court opinion. Either, although originally "full, fair and impartial", can be rendered inaccurate by later events in the judicial proceeding concerned. This is the true holding in Stevenson, supra, and Lewisohn, supra, which correctly - and narrowly, in

accordance with precedents - construed the New York State statutory privilege in issue and which the lower courts herein should have unquestioningly followed pursuant to 28 USC 1652. (In this regard, the first sentence on page 3 of respondent's Brief in Opposition herein, under "Reasons for Denying the Writ", would read more accurately if, for the word "subsequently" on line 5, the word "previously" were to be substituted.)

CONCLUSION

The deletion that is the subject of this controversy clearly and unequivocally implied to readers - lawyers and accountants - that petitioner herein was guilty of suborning perjury - a felony crime under the United States Code. In view of the strictures and prejudices against advertizing, etc., by members of

the Bar, this Court is respectfully requested to intervene on behalf of petitioner herein, whose reputation at the time of the defamatory statement in issue was predicated on 20 years of hard work and professional integrity.

Respectfully submitted,

Lorentz W. Hansen

Lorentz W. Hansen
Petitioner Pro Se